



**The Comptroller General
of the United States**

Washington, D.C. 20548

Decision

Matter of: Gunnery Sergeant Ernesto L. Verdugo, USMC
(Retired) - Waiver of Retired Pay
File: B-222852
Date: April 28, 1987

DIGEST

Retired members of the uniformed services are required by law to waive their military retired pay in an amount equal to any veterans disability compensation they receive. The waiver of military retired pay is to be based on the amount of disability compensation to which the retiree is actually entitled, as determined and paid by the Veterans Administration. Hence, in the case of a retired Marine Corps sergeant who was paid veterans disability compensation at a reduced rate, as adjudicated by the Veterans Administration due to his concurrent receipt of civil service disability compensation, the waiver of military retired pay is to be based on the reduced rate of the veterans compensation actually paid rather than the full rate that might otherwise have been payable.

DECISION

The issue presented in this case involves the reduction of the military retired pay of a retired Marine Corps gunnery sergeant on account of his receipt of disability compensation from the Veterans Administration.^{1/} The question is whether the reduction should be based on the full amount of his veterans disability compensation entitlement, or the lesser amount actually paid to him because of his concurrent receipt of civil service disability compensation for the same disabling condition. We conclude that the reduction of his military retired pay should be based on the lesser amount of the veterans disability compensation actually paid.

^{1/} This action is in response to a request for a decision received from Lieutenant Colonel M. K. Chetkovich, USMC, Disbursing Officer, Centralized Pay Division, Marine Corps Finance Center. The request was forwarded here by the Commandant of the Marine Corps after it was approved and assigned control number DO-MC-1463 by the Department of Defense Military Pay and Allowance Committee.

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BACKGROUND

Gunnery Sergeant Ernesto L. Verdugo retired from the Marine Corps in 1974. Following his retirement he was assigned a disability rating of 60 percent by the Veterans Administration (VA) because of an injury to his back which he sustained while serving on active duty with the Marine Corps. He elected to receive VA disability compensation based on that rating, and as a result he was required to waive a portion of his monthly military retired pay in an amount equal to his monthly VA disability compensation.

Sergeant Verdugo was appointed to a position of civilian employment with the federal government following his retirement from the Marine Corps in 1974. His back injury was apparently aggravated in the course of his civilian employment, and as a result he was awarded civil service disability compensation in 1983. In addition, his VA disability rating was increased in 1983 from 60 to 80 percent as the result of the aggravation of his back condition. The amount of his VA disability compensation was not increased, however, because the VA determined that such an increase would have duplicated the civil service disability compensation award.

The concerned Marine Corps disbursing officer states that the amount of Sergeant Verdugo's monthly VA disability compensation entitlement increased in 1983 by \$230, from \$517 to \$747, as the result of the increase in his VA disability rating from 60 to 80 percent. However, the VA withheld the \$230 increase on the basis of its determination that this would duplicate the civil service disability compensation award. The disbursing officer indicates that a question has arisen concerning whether his military retired pay should have been reduced by the total amount of his monthly VA disability compensation entitlement, \$747, or the lesser amount actually paid to him, \$517.

ANALYSIS AND CONCLUSION

Subsection 3104(a)(1) of title 38, United States Code, provides as follows concerning VA disability compensation:

"Except to the extent that retirement pay is waived under other provisions of law, not more than one award of pension, compensation, emergency officers', regular, or reserve retirement pay, or initial award of naval pension granted after

July 13, 1943, shall be made concurrently to any person based on his own service * * *."

Under that provision of law a retired member of the uniformed services is prohibited from receiving retired pay and VA disability compensation concurrently. An exception is authorized, however, under 38 U.S.C. § 3105, which provides that any person receiving military retired or retirement pay who would otherwise be eligible to receive VA disability compensation, "shall be entitled to receive such * * * compensation upon the filing by such person with the department by which such retired or retirement pay is paid of a waiver of so much of his retired or retirement pay as is equal in amount to such * * * compensation."^{2/} The general purpose of this waiver requirement is to prevent retirees from receiving dual compensation for the same service.^{3/}

Military retirees who accept civilian positions with the federal government, and who subsequently become eligible for civil service disability compensation as the result of injuries sustained in the course of their civilian employment, may receive the civil service disability compensation without any reduction in their military retired pay.^{4/} The applicable statutes prohibit the concurrent payment of civil service disability compensation and VA disability compensation for the same injury, however.^{5/}

Thus, military retirees must waive their retired pay in an amount equal to any VA disability compensation they receive

^{2/} An advantage to a retiree in waiving military retired pay to obtain an equal amount of disability compensation results from a reduction in the retiree's income tax liability, since military retired pay is generally treated as taxable income but disability compensation is not under the Internal Revenue Code. See 26 U.S.C. §§ 61, 72, 104, 122. Absher v. United States, 9 Cl. Ct. 223, 225 (1985). Such waiver may also reduce or eliminate liability under the dual compensation limitations of 5 U.S.C. § 5532.

^{3/} Absher v. United States, supra, 9 Cl. Ct. at page 226.

^{4/} See, generally, Federal Personnel Manual (FPM), ch. 810, § 7-3.a(3).

^{5/} See 5 U.S.C. § 8116(b). See also FPM, ch. 810, § 7-3.a(1) and (2).

for a disability related to their military service. They need not waive any of their retired pay to receive civil service disability compensation related to civilian government employment undertaken following their retirement from military service. If the civil service disability compensation received is based on an aggravation of a disability for which they are receiving VA compensation, however, the applicable laws generally appear to preclude the VA from increasing their VA compensation for the additional disability.

Hence, in the present case, Sergeant Verdugo was under no requirement to waive additional amounts of his military retired pay in 1983 in order to receive payment of the civil service disability compensation awarded to him because of the aggravation of his back injury. It appears that the VA determined that although the percentage of his disability increased he was not actually entitled to an increase in his VA disability compensation in 1983 predicated on the aggravation of his condition, since his receipt of civil service disability compensation for that aggravation precluded such an increase. It also appears that if Sergeant Verdugo had not waived military retired pay in favor of VA disability compensation, he would only have lost monthly VA disability compensation in 1983 in the amount of \$517, the amount determined by the VA to be actually payable to him, rather than some higher amount of hypothetical entitlement.

In these circumstances we are unable to find a basis in the terms of 38 U.S.C. §§ 3104(a)(1) and 3105, quoted above, for requiring a waiver of military retired pay in excess of the amount determined by the VA to be payable to Sergeant Verdugo as his actual VA disability compensation entitlement.^{6/} Therefore, we conclude that the amount of monthly military retired pay required to be waived by Sergeant Verdugo in 1983 on account of his receipt of VA disability compensation was \$517, and not \$747.

^{6/} To similar effect, see 28 Comp. Gen. 484, 486 (1949). Our jurisdiction here is, of course, limited to the issue of Sergeant Verdugo's entitlement to military retired pay. The Administrator of Veterans Affairs has exclusive jurisdiction to adjudicate entitlement to veterans benefits. 38 U.S.C. § 211(a). Also, the Secretary of Labor has the primary responsibility for administering civil service disability compensation. 5 U.S.C. § 8145.

The question presented is answered accordingly.

for *Milton F. Dorlar*
Comptroller General
of the United States